IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 10/01/2003

CORAM

THE HONOURABLE MR.JUSTICE P.SATHASIVAM
and
THE HONOURABLE MR.JUSTICE A.K. RAJAN

C.M.A.No.1550 of 1995
and
C.M.A.No.1758 of 1996

C.M.A.1550 of 1995:

P.Kalyanasundaram .. Appellant

-Vs-

K.Paquialatchamy .. Respondent

C.M.A.1758 OF 1996:
P.Kalyanasundaram .. Appellant
v.
K.Paquialatchamy .. Respondent

Civil Miscellaneous Appeal No.1550 of 1995 is filed against the judgment dated 14.11.1994 in M.O.P.No.94 of 1991 and Civil Miscellaneous Appeal No.1758 of 1996 is filed against the judgment dated 7-8-1996 in M.O.P.No.110 of 1995, on the file of the Family Court, Pondicherry.

!For Appellant : Mr. V.K.Muthusamy, S.C.,
for Mr.N.Jothi

^For Respondent : Mr.Lakshmi Narayanan.

:COMMON JUDGMENT

A.K.RAJAN, J.

The appellant and the respondent are husband and wife; the marriage between them took place on 4.7.1984 at Pondicherry, according to Hindu rites and custom; It was also registered before the Registrar, Pondicherry. The husband was working in the Ministry of Civil Aviation, New Delhi. Soon after the marriage, the husband and wife were residing at Delhi till 1988; they are living separately from 1988. There were some earlier judicial proceedings between the parties. Presently, the husband filed M.O.P.94 of 1991 on the file of the Family Court, Pondicherry against the wife seeking dissolution of

marriage. The Family Court dismissed his petition. C.M.A.No.1550 of 1995 is against challenging the judgment dismissing his petition for divorce. Subsequent to the dismissal of M.O.P.94 of 1991, the wife filed M.O.P.110 of 1995 seeking restoration of conjugal rights. The Court granted a decree of restitution of conjugal rights; Challenging that, the husband has preferred C.M.A.No.1758 of 1996. Thus in both the C.M.As., the husband is the appellant. In view of the nature of dispute, both the C.M.As. are heard together.

C.M.A.No.1550 of 1995:

2. The husband in his petition, M.O.P.94 of 1991 has stated that the wife had an overwhelming attachment towards her father and had an irresistible temptation to meet her father and hence very often she visited Pondicherry and stayed there for months together. The father of his wife is a wealthy person in the locality; He wanted his daughter by his side in Pondicherry; hence he requested the husband to get a job in Pondicherry; It was not to the liking of the husband. In the year 1988, the wife left the matrimonial home at Delhi and did not return thereafter, in spite of repeated requests made by the husband. This compelled the husband for making an application to the University of Pondicherry for a job; But he did not get the job. The father of the wife did not send her back on the ground of giving medical treatment; When he asked for a proof of her daughter's treatment, he abused him. A child was born to them on 5.7.1987. The petitioner was always prepared to condone the failings of his wife and take her and lead a peaceful life; Therefore, he filed a petition for restitution of conjugal rights in H.M.A.409 of 1988 before the District Judge, Delhi. But, the wife filed a petition before the Principal Sub-Judge, Pondicherry in M.O.P.No.96 of 1988 (re-numbered as M.O.P.25 of 1990) seeking judicial separation. The wife obtained stay of the proceedings of the Delhi Court. In view of the stay order granted by the Supreme Court, he withdrew that petition and presented another petition with the same prayer before the Family Court, Pondicherry in M.O.P.182 of 1990. The respondent/wife invented a string of stories of cruelties in her petition for judicial separation. They are only imaginary and invented only for the purpose of counter-blasting his petition for restitution of conjugal rights. Further, the wife sent petitions to his higher officers in the year 1990 making false allegations; and in the year 1990 also requested to take disciplinary action against the petitioner; in that, she has stated the purpose of the petitioner seeking a relief of restitution of conjugal rights was only to take her to Delhi and to kill her. The respondent/wife also filed a complaint before the Pondicherry Police Station on 25.9.1988. The false allegations made by the respondent against the petitioner are only to cover up the abnormal relations of the respondent with her father. The above conduct of the wife amounts to cruelty.

3. It is further stated that the Family Court at Pondicherry heard M.O.P.25 of 1990 and 182 of 1990 and by a common order dated 5.9.1990 granted judicial separation for none months in M.O.P.25 of 1990, it also directed the petitioner to pay Rs.600/- per month as maintenance to the child and adjourned the matter to 10.6.1991 in order to see whether the parties could come together. But the respondent/wife filed appeals against the order of the Family Court, dated 5.9.1990 before the High Court in C.M.As.1016 and 1017 of 1990. This makes it clear that the respondent/wife was not prepared for

re-union; she was bent upon separation. Even the suggestion made by the Judges of the High Court during the hearing of the C.M.As. was not heeded by the wife. The behaviour of the respondent/wife shows that she is having the doubtful integrity and character. The petitioner was ready and willing to take her back though she left the house without just and reasonable cause. But the respondent did not join the petitioner. The conduct of the wife in withdrawing from the company of the petitioner without any just cause amounts to desertion. Further, the respondent has unjustifiably withdrawn from the society of the petitioner for more than three years. By the conduct of the wife, it is not possible for the husband to live with the wife any longer. Her continued stay with her father is wilful and intentional and amounts to desertion. Hence, he is entitled for a decree of divorce.

4. In the counter filed by the wife in M.O.P.94 of 1991, she has stated that, the husband shifted the residence in Delhi for more than four times between May and October 1988 with a view to extract money from the respondent's father; that the petitioner was always keen in getting money from her father by ill-treating her with cruelty; It is only the petitioner who approached her father seeking a job at Pondicherry; The petitioner received huge money from the respondent's father on several occasions. The statement that the respondent was having abnormal relationship with her father is mischievous and defamatory; The petitioner has filed several proceedings against the respondent, but could not substantiate his case. The petitioner initiated proceedings for restitution of conjugal rights but subsequently has withdrawn it. Hence, the present petition for dissolution of marriage is unsustainable in law. Further, it is stated that the petitioner used to beat the respondent mercilessly at Delhi; As the obedient wife, she tolerated his brutal treatment while she was in Delhi. The petitioner even threatened the respondent that he would endanger the life of the respondent at Delhi. The petitioner refused to take the respondent in spite of the order of the Court.

It is not correct to say that the respondent unjustifiably withdrew from the society of the petitioner. The only motive of the respondent is to get money by threatening.

5. The wife filed M.O.P.110 of 1995 for restitution of conjugal rights; she has stated in that petition that the differences arose between the spouses due to the attitude of the husband, leading to misunderstanding resulting in series of litigations. The parties resorted to legal proceedings on burst of emotions; In 1988, both parties approached the Court of Law against each other. M.O.P.No.96 of 1988, renumbered as M.O.P.No.25 of 1990 was filed by the wife for judicial separation; M.O.P.182 of 1990 was filed by the husband for restitution of conjugal rights. The Family Court, Pondicherry passed a common judgment in M.O.P.25/1990 and M.O.P.182 of 1990, to the effect that the parties must live separately, "for a period of nine months and if the parties forget their differences and come to an understanding, they can unite together." that the husband should pay Rs. 600/- per month for the maintenance of the child. The husband did not file any appeal against that order. Instead, husband filed a petition for divorce on the ground of desertion and cruelty in M.O.P.94/1991. The Family Court in its order, dated 17.8.1992 granted a decree of divorce. Aggrieved by the decree of divorce,

the wife preferred an appeal before the High Court in C.M.A.1021 of 1992. A Division Bench of this Court attempted to reconcile the dispute and tried to re-unite the parties; but to the recalcitrant attitude of the husband, it could not succeed. Therefore, C.M.A.1021 of 1992 was decided on merits; and ultimately, the case was remanded pointing out four infirmities in the order of grant of divorce. The husband went on appeal to the Supreme Court, but the S.L.P. was dismissed. Thereafter, the Family Court heard the matter and ultimately dismissed M.O.P.No.94 of 1991 on 14.11.1994. Pursuant to that order, the petitioner made various attempts to join the respondent; she has written several letters to take her back to the matrimonial home. She even contacted over phone; Her repeated appeals for re-union went unheeded. The petitioner was always willing to join the respondent. The High Court during the hearing suggested that both the parties to go to New Delhi. The respondent booked tickets and reported to the Court; but when the petitioner was ready to go back to her matrimonial home, the respondent refused to take her back; no reason was assigned for the refusal. The Division Bench of the High Court also suggested both parties to go and meet the parents of the husband at Akkur village along with the respective parties to effect a conciliation; A date was fixed by both the sides and the petitioner along with her son, mother and father, her counsel went to meet the parents; but, neither the respondent nor his counsel turned up and hence, that attempt failed. All these incidents revealed that the petitioner was always willing to join her husband and it is the respondent who without any reasonable cause had withdrawn from the conjugal home. The respondent remained silent even after dismissal of the divorce petition. Therefore, the petition for restitution of conjugal rights has been filed. The respondent's failure to protect the conjugal rights of the petitioner has compelled the petitioner to move the present application for restitution of conjugal rights. Further, it is stated that the respondent is bound to take care of the minor son Sankaranarayanan; but no steps were taken by him; He did not even visit once to see the child. In law, he is bound to maintain the child. The child is studying in a convent; for his education, clothing , food and other expenditure, a sum of Rs.1,000 /- is spent by her every month. Further the basic requirement of the petitioner's maintenance works out to Rs.2,000/-. Thus, in all, the petitioner has to be paid Rs.3,000/- per month for maintenance. The respondent is working as Under Secretary in Central Government and earns Rs.10,000/- per month.

6. The husband in the counter filed by him in M.O.P.110 of 1995 raised some preliminary objections; that the dismissal of O.P.94/91 is pending in appeal before this Court; The petitioner/wife cannot take advantage of her own wrong; When the husband/respondent filed a petition for restitution of conjugal rights in Delhi during 1988, the wife filed a suit for judicial separation before Pondicherry Court; subsequent to the order passed by the Supreme Court transferring the petition pending in Delhi to Pondicherry that petition was withdrawn by the husband. But in the petition for judicial separation, the wife had stated that she apprehended danger for her life if she was to live with the husband in Delhi. She has also alleged that the husband attempted to pour kerosene on her to burn her alive. If really the intention of the wife was to return to the matrimonial home, she would not have filed a petition for judicial separation. Even after the grant of decree of judicial separation f or nine months, the wife never showed any intention

of rejoining. The petition for divorce filed under Section 13(1)(i-a) and (b) was after one year from the completion of judicial separation.
7. Further, the husband stated in his counter in M.O.P.110 of 1995 that this petition is not maintainable. She wrote letters to the Ministers, Secretaries and Joint Secretaries of Department of Civil Aviation in which he was working wherein it was stated that the main purpose of the husband filing a petition for restitution of conjugal rights was to take the wife to Delhi and to kill her; In view of such numerous letters written to his superior authorities, his career had been spoiled which amounts to cruelty. She also lodged false complaints to police against him; nearly three years after the marriage, differences arose between the spouses due to the insistence and persistence of the petitioner/wife to go to her father's house very often and due to the constant pressure exerted by the father of the wife to get a job and settle at Pondicherry; The father of the petitioner/wife is a pensioner getting Rs.40,000/- per month; Apart from that, they are having vast agricultural lands and they are also doing business in auto spare parts business in Karaikal. The petitioner has also completed her post-graduation in Sociology and she is drawing a salary of Rs.10,000/-; She is working as a teacher. It is only the petitioner/wife who deserted the matrimonial home. Even though the husband filed a petition for restitution of conjugal rights, the wife filed a petition for judicial separation and the Court also granted judicial separation; the present petition for restitution of conjugal rights is not bonafide and is designedly filed for consideration other than re-union; This petition has been filed after eight years of separation which was brought about by the petitioner herself; Therefore, this petition is liable to be dismissed on the ground of laches also. The suggestion made by the Hon'ble Judges of the High Court are conciliatory in nature. The respondent is the natural guardian for his son. The respondent has means to educate the child. In the circumstances, the custody of the child should be given to the respondent. The sole intention of the petitioner is only to harass the respondent. The petitioner is trying to take advantage of her own wrong.
8. The Family Court, Pondicherry framed seven points for consideration in M.O.P.94 of 1991. The husband was examined as P.W.1 and Exs.P.1 to P.31 were marked; On the side of the respondent, the wife was examined as R.W.1; R.W.2 has also has been examined; Exs.R.1 to R.8 were marked. Considering the evidence on record, the Family Court dismissed the petition for divorce.
9. On the Point No.1 as to whether the wife deserted the husband without any reasonable cause, the Family Court relying upon the letters written by both parties prior to the date of separate living has held that, " Ex.P.24 demolishes the plea of the petitioner." The Family Court also refers to Ex.P.9, dated 26.5.1990 sent by the respondent to Joint Secretary, Ministry of Civil Aviation, New Delhi and Ex.P.10, the copy of the police complaint given by the wife against the respondent and found that, "It is the rudimentary principle of social behaviour that between husband and wife, whenever there is any trouble, all in a sudden, they would not go to the extreme, but after harbouring their individual grievances in a part of the heart, they move normally. " Relying on these letters, the Family Court comes to the conclusion that the departure in May, 1988 by the wife was not due to the attachment to her father, but because she could not tolerate the behaviour of the petitioner. Therefore, the Family Court held that in these

circumstances, it cannot be stated that the respondent/wife had animus deserendi and hence, there was no desertion on the part of the wife.
10. The Family Court also held that without any reason, simply for the love and affection towards the father, no married daughter would stay with her father abandoning her husband. The theory of abnormal relationship has not been established by the petitioner and it is totally false. Further, it held, "the ego problem on both sides prevented them from amicably settling the differences between them, but it took a litigation course and it got snowballed to the present stage."; Therefore, there is no desertion by the wife.
11. The Family Court further observed that the wife could have refrained from resorting to legal course even when the husband has filed a petition for restitution of conjugal rights; the act of the wife in filing a petition for judicial separation was nothing but, "a hasty counter-blast which triggered the anger of the husband further. " Relying upon the failure on the part of the husband to take back his wife to Delhi on the advice given by the Division Bench of this Court, the Court came to the conclusion that the wife was not at fault.
12. With respect to Point No.2 as to whether desertion, if any, by the wife got terminated on the expressing of willingness to join the husband, the Family Court has come to the conclusion that assuming that previously the wife deserted the husband, it got terminated by the unconditional acceptance of the wife to accompany the husband to resume conjugal life.
13. With respect to Point No.3 whether the desertion if any by the respondent/wife was condoned by the petitioner/husband, the Family Court held that, "mere filing of the petition for restitution of conjugal rights would not amount to condoning of cruelty." Though it is not happily worded, it appears that this issue has been decided in favour of the husband.
14. With respect to Point No.4 as to whether there was desertion, if any, for a continuous period of two years preceding the date of filing of the petition for divorce, the Court held that since the finding of the Court is that there is no desertion on the part of the wife, this point is held against the petitioner. The Family Court has also stated,
" For complying with the High Court's direction only the Point No.4 has been framed and considered. As such, Point No.4 is decided in favour of the respondent and as against the petitioner to the effect that there was no desertion for a continuous period for two years anterior to the filing of petition for divorce. "
15. With respect Point No.5, the Court also found that the respondent/wife is not relying on it to live away from her husband, but she likes to live with her husband. Therefore, this point has been answered against the husband; Thus the Family Court has held that due to the act of cruelty committed by the husband, he was not entitled for the decree of dissolution of marriage.
16. (i) In M.O.P.No.110 of 1995, the Family Court has framed four points for consideration. With respect to Point No.1, the Court has found that there was no insincerity in filing the present application. With reference to the earlier petition for judicial separation, the Family Court has found that she was misguided by her counsel for filing the petition for judicial separation. Even if the fact is not proved, the respondent herein expressed her desire to join her husband. From this, this Court concludes

that there was no insincerity on the part of the wife.
(ii) In respect of Point No.2, whether the petitioner was entitled for the decree of restitution of conjugal rights with the respondent, the Family Court held that the respondent/husband was not able to prove any reasonable excuse for his withdrawal from the society of the petitioner. Therefore, this issue has been decided in affirmative holding that the petitioner/wife was entitled for the decree of restitution of conjugal rights as against the respondent.
(iii) With respect to Point No.3 whether the petitioner was entitled for award of maintenance of Rs.3,000/-, the Family Court has held that the evidence of the wife that the husband is earning Rs.10,000/- is acceptable and grant of 30 per cent of his salary towards the maintenance of his wife and child is reasonable.
(iv) Point No.4 is only for consequential relief.
17. The learned counsel for the appellant submitted that Ex.P.24, a letter written on 5.9.1984 almost three years prior to the date of separate living, cannot be the basis to decide the issue. This argument is acceptable. There is no dispute that parties were living cordially till the birth of the child in July, 1987. Inasmuch as this letter is three years prior to that date, this letter cannot be the basis to decide the issue.
18. The Family Court refers to various letters written prior to May, 1988. Only the letters, Ex.P.17 and P.19 are the letters subsequent to May, 1988; Ex.P.19 refers to the departure by the wife on 30.5.1 988; the husband apologized for his conduct on that date and Ex.P.17 reveals that he intended to her back on 22.7.1988; Thereafter, there was an attempt made by the wife to get a job for the husband in Pondicherry University; From these letters, the Court concluded that there was no intention of the wife leaving the matrimonial home. This conclusion of the Court does not appear to be correct. If the wife had no intention of leaving the matrimonial home, the wife would have joined the husband on the earliest opportunity; but even when the husband filed a petition for restitution of conjugal rights in the years 19 88, the wife resisted that by filing a petition for judicial separation on the ground of cruelty. Hence, the finding of the Court is not sustainable.
19. Further, the counsel for appellant contended that it cannot be said that the cruelty or desertion committed by the wife has been condoned by the husband. Learned counsel relied upon a decision in Dastane v. Dastane ((1975) 2 S.C.C. 326, wherein the Supreme Court held,
" Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things: forgiveness and restoration.
But condonation is always subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence, either of the same variety as the one condoned or of any other variety. ` No matrimonial offence is erased by condonation. It is obscured but not obliterated.' Since the condition of forgiveness is that no further matrimonial offence shall occur, it is not necessary that the fresh offence should be ejusdem generis with the original offence. Condoned cruelty can therefore be revived, say by desertion or adultery. `Condonation' under Section 23(1)(b) therefore means conditional forgiveness, the implied condition being that no further matrimonial offence shall be committed. "

The Learned counsel next relied upon the decision in Emmanual v. Mandakini (A.I.R. (33) 1946 Nagpur 69) wherein it was held that,

" Condonation means forgiveness of a conjugal offence with full knowledge of all the circumstances. It is not a question of law but of fact. Cohabitation which means connubial intercourse is prima facie evidence of condonation. There is a distinction between forgiveness and condonation and the distinction lies in the fact that condonation implies a complete reconciliation in the sense of reinstating the offender to conjugal cohabitation or intercourse. "

The counsel also referred to the judgment in W. v. W. (No.2) 1954 (2) All England Reporter 829 for the proposition that whether the offer for re-union is genuine has to be decided bearing in mind the background of the case. He also referred to the following paragraph in Halbury's Law of England with reference to "offer" of return.

" The offer must be genuine, that is it must be made in good faith in the sense that it is an offer to return permanently which, if accepted, will be implemented, and is an offer containing an assurance to terminate the conduct, if any, that caused the separation. An offer must likewise be made in good faith where the parties separated consensually. "

Relying upon the above judgments and observations, the learned senior counsel submitted that the alleged offer by the wife to come and live with the husband is not genuine and hence, it has to be held that it is not bonafide.

20. Therefore, learned senior counsel for the appellant submitted that the Court erred in its conclusion that even assuming that the wife deserted, it got terminated when the wife unconditionally agreed to accompany the husband to Delhi. The counsel submitted that the mere offer does not prove animus revertendi. This argument of the counsel for appellant is acceptable. The desertion does not get terminated on the mere offer to go back to the matrimonial home. When the wife did not in fact join the husband, the desertion cannot be said to have been terminated. Therefore, the conclusion of the Court is not legally sustainable.

21. Learned senior counsel also referred to the judgment in Adhyatma Bhatta Alwar v. Adhyatma Bhattar Sri Devi ((2002) 1 Supreme Court Cases 308) wherein the Supreme Court has held that,

" "Desertion" in the context of matrimonial law represents a legal conception. It is difficult to give a comprehensive definition of the term. The essential ingredients of this offence in order that it may furnish a ground for relief are:

" 1. the factum of separation;

2. the intention to bring cohabitation permanently to an endanimus deserendi;

3. the element of permanence which is a prima condition requires that both these essential ingredients should continue during the entire statutory period. "

Relying upon this judgment, learned senior counsel submitted that during the entire period after the wife left the matrimonial home till the date of filing of the petition, the first two ingredients are proved to have existed. Therefore, the trial Court should have granted decree of divorce. This argument of the counsel for appellant is acceptable. From the date on which the wife left the house at Delhi on 3 0.5.1988, she never returned to Delhi; nor the husband and wife lived together even for a single day. Therefore, the factum of separation is proved. As already stated, the fact that the wife

resisted the petition filed by the husband for restitution of conjugal rights by filing a petition for judicial separation proves animus non-revertendi; it proves the intention of the wife not to return to the matrimonial home. Thus, the first two ingredients mentioned above are proved to have existed.

22. That apart, the learned senior counsel submitted that for the past 14 years, the parties are living separately and therefore, it is not possible for them to re-unite and therefore, on that ground also the husband is entitled to for decree of divorce. In support of that, learned senior relied upon the decision in Sudhakar v. Smt. Kalavati (II (2001) DMC 155), wherein it was held that,

" No Marital relationship existing between parties for last 16 years; reconciliation not possible. "

and on that ground,divorce was granted.

He also referred to another judgment of the Orissa High Court in Mrs. Gayatri Mishra v. Pramod Kumar Nanda (I (2000) DMC 102 (DB)), (Divorce and Matrimonial cases), wherein it was held,

" that the wife is voluntarily depriving her husband of her society and cohabitation for years. The husband, therefore, can definitely be said to be under the strain of wilful separation for years and complete denial of conjugal relationship. This would amount to causing mental cruelty. The husband is in his thirties-the prime of his life-and once he entered into the wedlock, he could naturally like to have conjugal relationship with the wife and in case the latter refuses to cohabit with him for years together, it is bound to cause him both mental and physical torture which, would be covered by the expression "cruelty" as used in connection with matrimonial matters covered by Section 13(1)(i-a) of the Act. "

Learned counsel also referred to the judgment of the Supreme Court in Romesh Chander v. Savitri ((1995) 2 S.C.C. 7), wherein the Supreme Court held that,

" marriage being dead, both emotionally and practically, continuance of marital alliance for namesake would to prolonging the agony and affliction and would be cruelty; hence in exercise of power under Article 142, the marriage between appellant and respondent directed to stand dissolved subject to the appellant transferring his house in the name of his wife. "

23. Placing reliance on these decisions, the learned senior counsel submitted that even in this case, the spouses are living separately for nearly 14 years now and hence following the decision of the Supreme Court, the husband has to be granted divorce, as prayed for.

24. Learned counsel for the respondent submitted that the decision of the Supreme Court exercising the power under Article 142 of the Constitution of India is not a ratio decidendi and therefore, a similar relief granted therein cannot be granted by this Court, since the High Court has no power similar to Article 142 of the Constitution. Therefore, the fact that Supreme Court has dissolved a marriage on the ground that there was no marital relationship for a period of 14 years cannot be said to be a ratio decedendi and hence is not a binding precedent; hence on that ground, divorce cannot be granted. This argument of the counsel for the respondent is acceptable. The Supreme Court has power under Article 142 to decide an issue even outside the scope of a statute; the Supreme Court can supplement the legal provisions in order to render complete justice in a given case, as held by the Supreme Court in the case in Delhi Development Authority v. Skipper Construction Co.(P) Limited (A.I.R. 1996, S.C.2005). Therefore, merely because the parties were

living separately for more than 14 years, this Court cannot grant a decree of divorce presuming that the marriage is dead between the parties, unless the relief can be granted otherwise, in accordance with law.

25. Learned senior counsel further submitted that the Supreme Court in Kameswara Rao v. G.Jabilli ((2002) 2 S.C.C. 296 has held that false police complaint and consequent loss of reputation and standing in society at the instance of one's spouse would amount to cruelty. On the same ground, since the wife has given a false complaint to police and that amounts to mental cruelty and on that ground also, the husband is entitled for divorce.

26. Learned senior counsel further relied upon a decision in Devram Bilve v. Indumati ((2000) 10 S.C.C. 540), wherein the Supreme Court has held that letters written to superiors containing false and baseless allegations amount to cruelty. Admittedly, the counsel submitted, the respondent/wife has written letters to the superiors of the husband alleging falsity; therefore, that act amounts to cruelty and therefore, in any even, the Family Court should have granted divorce, as prayed for.

27. Learned counsel for the respondent relies upon a decision of the Supreme Court reported in Bipinchandra Shah v. Prabhavati (A.I.R.195 7 S.C. 176), where the concept of desertion has been elaborately dealt with; he mainly relied upon the following passage,

" Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence, it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the Courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the Court. "

Therefore, the counsel for the respondent submitted that since the wife had expressed her desire to go back to the marital house, the desertion comes to an end and applying that principle to the present case, since the wife has filed a petition for restitution of conjugal rights, it has to be concluded that desertion has come to an end.

28. This argument of the counsel for the respondent is not acceptable. For the reasons stated above, the "offer" of the wife was not genuine. Therefore, the desertion of the wife has not come to an on the date when the petition for divorce was filed by the husband. Therefore, this decision will not help the respondent, in any manner.

29. According to the Family Court, when the wife expressed her desire to join him and to go along with him to Delhi on the advice of the Division Bench, the desertion got terminated. The Court has held that " As opined by the Family Court in its judgment, dated 5.9.1988, the wife aptly agreed to resume cohabitation forgetting the past and the husband alone negatived it. " According to the Family Court, the animus revertendi on the part of the wife

was clearly established; therefore, that point was also decided in favour of the wife and against the husband. There is no judgment dated 5.9.1988 by any of the Courts. Presumably, the Family Court refers to the order dated 5.9.1990 whereby the Family Court ordered "the wife shall live away from her husband for a period of nine months."

30. The Family Court refers to the ingredients to the act of desertion in an earlier paragraph, that "animus" and "factum deserendi" must be proved. The Court has come to the conclusion that it cannot be stated that the wife had "animus deserendi" and therefore, the Court has held that it proves the animus revertendi and therefore, it came to the conclusion that desertion has not been proved against the wife. Admittedly, after 30.5.1988, the parties never resided together; that is, the wife had not returned to the matrimonial home after that date. Assuming for the sake of argument that the wife had the intention of resuming cohabitation, that alone is not sufficient. Admittedly, the wife left the house with her father and thereafter never returned. The case of the husband is that the wife had left the house with the intention to leave the matrimonial home; therefore, the mere statement/expression of intention to return is not sufficient; that is, mere animus revertendi is not sufficient to terminate the act of desertion; that intention must be coupled with factum revertendi, that is the wife should have in fact returned to the matrimonial home. In the above circumstances, it cannot be held that the desertion had come to an end. The conclusion of the Family Court that the expression of willingness to come back to the home is sufficient and it terminates the desertion is erroneous. Therefore, the finding of the Family Court regarding points-1 and 2 is not legally sustainable and hence are liable to be set aside and hence set aside.

31. By order dated 5.9.1990 as seen from Ex.P.11, the Family Court, Pondicherry has passed a very strange order of judicial separation for a period of nine months. As per Section-10 of the Hindu Marriage Act, either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in subsection(1) of Section 13 of the Act and the Court can come to a conclusion that whether the petitioner was entitled to a decree of judicial separation or not. If the Court comes to the conclusion that there are sufficient grounds to grant judicial separation, it shall grant judicial separation. If it finds that the grounds are not sufficient to grant judicial separation, it has to dismiss the petition for judicial separation. It is not legal for any Court to grant a decree for judicial separation only for a period of nine months or for any specified period.

32. Aggrieved by the common order passed by the Family Court on 5.9.1990 in M.O.P.25 of 1990 and 182 of 1990, the wife filed two appeals in A.A.O.1016 of 1990 and 1017 of 1990; one appeal was to enhance the award of Rs.600/- per month as maintenance for the child and another appeal was against the grant of judicial separation only for a limited period of nine months. A Division Bench of this Court has dismissed those appeals on 8.10.1991 holding that it was only an interim order since the case was posted for further hearing; it did not go into the merits of the order. Thereafter, on 28.2.1992, the Family Court, Pondicherry dismissed M.O.P.25 of 1990 for the reason that the husband filed a petition for divorce; on the same day, M.O.P.182 of 1990 was dismissed as not pressed. No appeal was filed against the dismissal of M.O.P.25 of 1990 by the wife.

33. Therefore, the present C.M.A.No.1550 of 1995 (filed against the dismissal of M.O.P.94 of 1991) M.O.P.94 of 1991 has to be decided on the basis of evidence on record. Admittedly the wife left the matrimonial home at Delhi on 30th May, 1988. The reason stated by her, viz., that was due to cruelty of the husband for the reasons already stated is not acceptable; Therefore, the act of leaving the matrimonial home by the wife is not justifiable under Section 13(1) of the Hindu Marriage Act. Even thereafter, the husband filed a petition for restitution of conjugal rights, as early as 5.9.1988 before the Delhi Court; but the wife resisted it and filed a petition for judicial separation before the Family Court, Pondicherry. Thereafter, the husband withdrew the petition filed before the Delhi High Court and filed a similar petition for restitution of conjugal rights before the Family Court, Pondicherry. But even then, the wife did not withdraw her petition for judicial separation, but contested her petition for judicial separation. This proves beyond any doubt that the wife had no intention of returning to the matrimonial home. Therefore, there was no animus revertendi for the wife on any date. This one factor is sufficient to hold that the Family Court has come to an erroneous conclusion that the wife was always willing to join the matrimonial home.

34. On the other hand, the stand of the wife was that she was afraid to go to Delhi and join the matrimonial home because according to her, the intention of the husband was to take her to Delhi only to kill her. She also alleges that during the stay at Delhi before her return to Pondicherry in 1988, there was an attempt by the husband to set her on fire pouring kerosene, but in her evidence, the wife admits that in Ex.P.9, she has not stated that the husband filed the petition for restitution of conjugal rights with intention to kill her in Delhi. If it was true that the husband attempted to kill by pouring kerosene on her when they were living in Delhi, she would not have omitted to say that in her petition in M.O.P.No.25 of 1990 or in the counter in M.O.P.182 of 1990. Therefore, the reason given by the wife does not appear to be true. This conclusion is fortified by subsequent letters as referred already that the father of the wife wanted him to take a job at Pondicherry and he also applied for a post in Pondicherry University on such advice. Thus, the reason given by the wife for not willing to join the husband when he filed a petition for restitution of conjugal rights does not appear to be true.

35. The other reason alleged by the wife for separate living was that the husband was demanding money on various occasions and that he alleged that the wife had abnormal relationship with her father. In so far as the demand of money is concerned, that cannot be the reason for living separately when it is not coupled with any other act of cruelty. With respect to the "abnormal relationship", the husband has deposed in the cross-examination as follows:

" By abnormal relationship as stated in the petition, I meant that my father-in-law could not leave his daughter and my wife could not live without her father. But after marriage, one does not accept so much attachment towards her father. Except this, I do not mean anything. "

Therefore, such a statement does not amount to cruelty within the meaning of Section 13(1)(i-a) of the Hindu Marriage Act. Therefore, the reasons stated by the wife for living separately is not a justifiable reasons under the Act. Therefore, the act of the wife, withdrawal from the matrimonial home amounts to desertion within the meaning of Section 13(1) of the Hindu marriage Act, as

held by the Supreme Court in the case G.V.N. Kameswara Rao v. G.Jabilla (2002(2)S.C.C. 296).

36. The High Court in C.M.A.1021 of 1992 set aside the earlier order of the Court and remanded the case for fresh disposal. In that, the High Court has held that,

"Judicial separation for a period of nine months ordered by the Family Court has to be excluded while calculating the period of two years immediately preceeding the date of filing of the petition for divorce on the ground of desertion. So calculated, the present petition for divorce in M.O.P.94 of 1991 does not satisfy the two years' period. Therefore, the petition is liable to be dismissed on that ground alone."

Even excluding the nine months, the period of two years was complete on the date when the petition was filed. This Court has been misled to believe that the two years period was not complete on that date. Admittedly, the wife left the matrimonial home on 30th May, 1988. M. O.P.94 of 1991 has been filed on 12.6.1991. Therefore, it is 3 years and 12 days from 30.5.1988. Even excluding nine months' period of judicial separation, it comes to 2 years, 3 months and 12 days. Therefore, viewed from any angle, this petition has been filed only after completion of two years immediately before the presentation of the petition. Since the petition has been presented after two years, it should have been allowed by the Family Court.

C.M.A.No.1758 of 1996:

37. Admittedly, the wife has given police complaint against the husband containing false allegations. The wife has also written letters to the higher officers of the department in which the husband was working; the allegations stated therein was not proved by the wife and hence such act of the wife amounts to cruelty within the meaning of Section 13(1)(i-a) of the Hindu Marriage Act as per the judgment of the Supreme Court in Devram Bilve v. Indumati ((2000) 10 S.C.C. 540).

38. Therefore, the dismissal of the petition for divorce is not legally sustainable. Hence the judgment of the Family Court is set aside the petition, M.O.P.94 of 1991 is allowed as prayed for.

39. As seen already, initially it was the husband who filed the petition for restitution of conjugal rights in M.O.P.182 of 1990, but that was opposed by the wife by filing a petition in M.O.P.25 of 1990 for judicial separation and both the petitions were dismissed. Therefore, the present M.O.P.110 of 1995 has been filed by the wife for restitution of conjugal rights long after, the husband filed the petition in M.O.P.94 of 1991 for dissolution of marriage on the ground of desertion. Even assuming that the wife's intention to join the matrimonial home terminates the act of desertion, that should have been expressed before the expiry of two years from the date of leaving the home or atleast before a petition for divorce was filed by the husband as per the decision of the Supreme Court relied on by the counsel for the respondent, Bipinchandra Shah v. Prabavathi (A.I.R.1957 S.C. 176). Inasmuch as the husband had filed the petition for divorce already in the year 1991, the offer of the wife to join the matrimonial home by filing the present petition for restitution of conjugal rights in the year, 1995 does not help the wife. It is also to be seen that the wife filed the petition in M.O.P.110 of 1995 for restitution of conjugal rights only after the Family Court had dismissed the petition in M.O.P.No.94 of 1991 filed by the husband for divorce was dismissed on 14.11.1994. The finding of the Court that when the wife

expressed her willingness to go to Delhi before the Division Bench of this Court terminates the desertion, if any, is not legally sustainable for the reasons stated above. Therefore the grant of decree of restitution of conjugal rights is liable to be set aside and hence set aside. Consequently, this appeal is allowed.

40. Admittedly, the minor son is liable to be maintained by the husband. Considering the fact that the child is studying and the fact that the husband/father of the minor is a highly placed Central Government employee and the award of Rs.1,000/- per month is reasonable. Hence, we confirm the order of maintenance towards the son.

41. In so far as the maintenance of the wife, the Family Court awarded maintenance of Rs.2,000/- per month, taking into account the salary of the husband. Section 25 1) of the Hindu Marriage Act reads as follows:

"S.25. Permanent alimony and maintenance:

(1) Any court exercising jurisdiction under this Act, may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant (the conduct of the parties and other circumstances of the case), it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent. "

42. This Court in the case Rajagopalan v. Kamalammal (A.I.R. 1982, Madras, 187) has held that under Section 25 of the Hindu Marriage Act, permanent alimony can be granted even to an erring spouse. Therefore, even though the decree of divorce is granted on the ground of desertion by the wife and hence the wife is the erring spouse, yet it does not preclude the Court from passing the order of maintenance. After considering this provision and the above decision as well as the the fact that the husband is the highly placed civil servant in the Central Government, the award of maintenance granted by the Family Court is confirmed. With this modification, this appeal is allowed.

43. In the result, C.M.A.No.1550 of 1995 is allowed and C.M.A.No.175 8 of 1996 is partly allowed.

Index: Yes

Web Site: Yes

vs

□